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IN THE

Supreme Court of the United States

October Term 1960

No. 732

WALGREEN CO., an Illinois Corporation,

Appellant,

vs

COMMISSIONER OF TAXATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF MINNESOTA

BRIEF IN OPPOSITION TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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THE APPELLEE HAS NOT ANSWERED THE APPELLANT'S ARGUMENT THAT THE EFFECT OF THE FORMULA IS TO IMPORT INTO MINNESOTA INCOME EARNED IN OTHER STATES.

1. Concession made in appellee's brief reduces the case to one issue.

On page 3 of his Statement Opposing Jurisdiction, appellee states that he has never denied to appellant the right

to show that use of the formula violates the Due Process and Commerce Clauses of the United States Constitution. This is a significant admission by appellee. Contrary to this statement, appellee's position heretofore has been that appellant does not have this right. In his brief to the Minnesota Supreme Court, counsel for appellee stated at page 75:

> "It was testified by Mr. Wm. G. Burkman, Director of the Minnesota Income Tax Division *that the three-factor formula has uniformly been applied to all unitary taxpayers.* The only taxpayers permitted to use the separate accounting method were non-unitary businesses. An example of this given by Mr. Burkman was construction projects." (Emphasis added).

The present position of appellee, as now stated on page 4 of its Statement, is that appellant must use the formula because it most fairly allocates taxable income to Minnesota. Appellant has always maintained that the crucial issue in this litigation is whether the formula has the effect of importing into Minnesota income which has been earned from appellant's activities in other states. Appellee now concedes that this is the only issue.

2. Appellant has shown that appellee is taxing income earned beyond his jurisdiction.

Appellant has shown, beginning on page 17 of its Jurisdictional Statement, that for two of the years involved the appellee's formula apportions more income to Minnesota than was earned by identifying all items of gross income assignable to Minnesota and subtracting therefrom only the direct deductions incurred in Minnesota—and ignoring all expenses incurred outside the state. A similar showing was made for the four years in question as a whole. It is therefore apparent that any income in addition to that so arrived

at *must* have been imported from activities of appellant outside of Minnesota.

If this analysis of appellant is incorrect, appellee should be able to show either (1) an insufficient amount of gross income has been assigned to Minnesota under this analysis or (2) more than the allowable amount of deductions have been claimed. The latter is clearly not so because the Minnesota Supreme Court has said in reference to these deductions "All such expenses were allowed by defendant as proper." (Appendix A to Jurisdictional Statement, page 28). This leaves for argument the amount of income found under the analysis from appellant's activities in Minnesota. Appellee has never shown that the gross income for each of the four years was too small or that it does not represent the maximum amount of gross income from appellant's activities in Minnesota. His Statement Opposing Jurisdiction makes no reference to this point. Instead, appellee argues that appellant's burden is not discharged by a showing under separate accounting.

However, the issue in this case is *not* whether separate accounting is the proper method of assigning taxable net income to Minnesota. The issue is whether the formula of appellee apportions more taxable net income than was attributable to appellant's activities in Minnesota. Appellant insists it does because the formula produces more income than is determined after identifying the maximum amount of gross income from Minnesota sources in each of the four years and deducting therefrom only what are conceded to be allowable deductions. Appellee simply does not answer this argument in his Statement Opposing Jurisdiction.

On page 5 of his Statement, appellee refers to the dismissal by this Court of the appeals in *El Dorado Oil Works*

v. McColgan, 34 Cal. 2nd 731, 215 P. 2nd 4, *appeal dismissed* 340 U.S. 801 and *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal. 2nd 214, 238 P. 2nd 569, *appeal dismissed* 343 U.S. 939. In neither of these cases was the taxpayer able to make the showing appellant has made in the instant case.

3. Appellee's attempt to rely on sales factor alone is contrary to the record.

In the early stages of this litigation, the parties agreed that the sales factor alone does not assign the proper amount of taxable net income to Minnesota. Thus, the Trial Court found "That the plaintiff and the defendant both concede that the sales formula alone does not result in a proper reflection of Minnesota taxable net income." (Appendix B to Jurisdictional Statement, page 40). The Minnesota Supreme Court stated " • • • both plaintiff and defendant concede that the sales formula alone as defined in a §290.19, Subd. 1 (2) (a) is not applicable here" (Appendix A to Judisdictional Statement, page 31). On page 6 of his Statement, appellee determines an average ratio of 5.52 percent, in comparing the Minnesota sales to national sales, and on page 7, he makes the unsupported argument that 5.52 percent of appellant's income is therefore earned in Minnesota. The fact that the appellant's Minnesota sales were 5.52 percent of its total sales does not establish that 5.52 per cent of its taxable net income is assignable to Minnesota. Further, this argument is clearly contrary to the early agreement of the parties that the sales factor or formula is not the proper

measure. The use by appellee of this argument to show that the three-factor formula was neither arbitrary nor unreasonable should be ignored.

Respectfully Submitted,

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